ENTERED
Clerk, U.S. District Court
March 6, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) JUDGMENT
	)
v.	)
	)
WILLIAM DUNCAN, Warden, et al.,	)
	)
Respondents.	)

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The amended petition for writ of habeas corpus is denied without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein.

DATED: 3-4-98

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
March 4, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) ORDER ADOPTING REPORT
	) AND RECOMMENDATION
vi.	) OF UNITED STATES
	) MAGISTRATE JUDGE.
WILLIAM	)
DUNCAN,	)
Warden, et al.,	)
	)
Respondents.	)
	)

Pursuant to 28 U.S.C. § 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and approves and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: 3-4-98

WILLIAM J. REA
United States District Judge

FILED
Clerk, U.S. District Court
February 9, 1998
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

YAHYA LAVI,	) Civil No.CV 97-5368-WJR(Mc)
	)
Petitioner,	) REPORT AND RECOMMENDA-
	) TION OF UNITED STATES
vii.	) MAGISTRATE JUDGE ON A
	) PETITION FOR WRIT OF
WILLIAM	) HABEAS CORPUS BY A
DUNCAN,	) PERSON IN STATE CUSTODY.
Warden, et al.,	)
	)
Respondents.	)
	)

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The petitioner is a state prisoner in the California Men's Colony at San Luis Obispo, California. Following a jury trial in the Los Angeles County Superior Court, the petitioner was convicted of two counts of rape of an

unconscious victim, three counts of rape by a foreign object of a victim unable to resist, two counts of sexual battery of an institutionalized person and three counts of misdemeanor sexual battery. On June 6, 1994, the trial court sentenced the petitioner to a total term of 13 years in state prison.

On April 17, 1996, the petitioner's conviction was affirmed on appeal to the California Court of Appeal which modified the judgment by removing one day of presentence custody credit. The petitioner filed a petition for review in the California Supreme Court. On July 24, 1996, the California Supreme Court denied the petition for review.

The petitioner then filed a petition for writ of habeas corpus in the California Court of Appeal. On July 24, 1997, the California Court of Appeal denied the petitioner's petition for writ of habeas corpus.

Thereafter, the petitioner filed a second petition for review in the California Supreme Court. On September 8, 1997, the California Supreme Court denied the petitioner's second petition for review on the merits.

On September 18, 1997, the petitioner filed his amended petition for writ of habeas corpus in this court. The petitioner claims the following:

Claim Number One

The trial court violated the petitioner's Sixth Amendment right of confrontation and Fourteenth Amendment right to due process of law when it:

(a) did not permit the petitioner to cross-examine any of his accusers to show demands of $5 million on the accusers' civil suits against the petitioner;

(b) did not permit cross-examination of victim Lazara G. regarding:

(i) the falsity of a prior claim of sexual harassment; and

(ii) a false police report filed by Lazara G.

Claim Number Two

The trial court violated the petitioner's right to due process when it admitted inflammatory and irrelevant evidence concerning the petitioner's character and prior bad acts, resulting in a trial which was fundamentally unfair.

Claim Number Three

The petitioner received ineffective assistance of trial counsel when trial counsel failed to call Hector Rosales as a witness to show that victim Lazara G. had previously filed a false claim of sexual harassment.

Claim Number Four

The petitioner suffered cumulative prejudice as the result of the combined effects of Claim Numbers One, Two and Three, above, rendering the petitioner's trial

fundamentally unfair and denying the petitioner his right to due process, guaranteed by the Fourteenth Amendment.

DISCUSSION

A petition for writ of habeas corpus by a person in state custody may not be granted unless all available state court remedies have been fully exhausted. 28 U.S.C. § 2254(b), (c); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). If a petition contains both exhausted and unexhausted claims, the entire petition is subject to dismissal. Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988).

State remedies have not been exhausted unless and until the merits of the petitioner's federal claim have been fairly presented to the state's highest court. Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995); Castille v. Peoples, 489 U.S. 346, 350-351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) (citing Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 508, 512, 30 L.Ed.2d 438 (1971)); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). A claim is fairly presented to the state's highest court if the petitioner raises "the operative facts and legal theory" on which his claim is based. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986); see also Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct.276, 74 L.Ed.2d 3 (1982). In fairly presenting a federal claim, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, [citation omitted], or that a somewhat similar state law claim was made." Anderson v. Harless, 459 U.S. at 6 (citing Picard v. Connor, 404 U.S. at 276-77).

The petitioner here filed two applications for post-conviction relief in the California Supreme Court: a petition for review, filed March 24, 1996 ("the first petition for review") and a petition for review, filed July 29, 1997 ("the second petition for review"). The first petition for review squarely raised Claim Numbers One and Two, above, did not raise Claim Number Three, above, and made an argument that the cumulative impact of many claimed deficiencies asserted in that petition rendered the petitioner's trial fundamentally unfair. (Answer, Exhibit "C", p. C-48). The second petition for review raised only Claim Number Three, above, and did not raise a claim of multiple errors resulting in a cumulative impact. (Answer, Exhibit F, pp. F79-115.)

Claim Number Four of the amended petition now before this court contains a claim of multiple errors in Claim Numbers One, Two and Three, above, resulting in a cumulative impact which rendered the petitioner's trial fundamentally unfair. The petitioner has never presented this exact cumulative impact claim to the California Supreme Court. The only cumulative impact claim which the petitioner has previously presented to the California Supreme Court included only Claim Numbers One and Two, above, and did not include Claim Number Three, above.

To satisfy the exhaustion requirement, the petitioner must fairly present the substance of his claim to the California Supreme Court. Picard v. Connor, 404 U.S. at 275. The petitioner here never presented his current cumulative impact claim to the California Supreme Court. ; He presented a different cumulative impact claim qhich included only two of the three claims included in his current claim. To satisfy the requirement of exhaustion of

state remedies, a state prisoner must present the state court with the same claim he urges on the federal court. Picard v. Connor, 404 U.S. at 276. The petitioner here presented a different claim in the state court.

The petitioner has not exhausted state remedies in the California Supreme Court as to Claim Number Four, above, the cumulative impact claim. The amended petition thus constitutes a "mixed petition" of exhausted and unexhausted claims and must be dismissed. Rose v. Lundy, 455 U.S. at 522. The court should deny the amended petition, without prejudice, for failure to exhaust state court remedies.

RECOMMENDATION

The Magistrate Judge therefore recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the amended petition without prejudice to the petitioner's right to file a new petition after he has exhausted state remedies with regard to the issues raised therein.

Dated: February 9, 1998

JAMES W. McMAHON
United States Magistrate Judge